IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES FITZGERALD GOUDEAU,

Petitioner,

vs.

TULSA COUNTY JAIL and THE STATE OF OKLAHOMA

Respondents.

Case No. 97-CV-135-H

REPORT AND RECOMMENDATION

Petitioner, appearing pro se, submitted a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 for filing on February 12, 1997. On March 31, 1997 the undersigned United States Magistrate Judge entered an order directing Petitioner to cure deficiencies in his petition and his motion for leave to proceed *in forma pauperis* by April 29, 1997.[1] [Dkt. 3].

Subsequently, the Court has received several letters from Petitioner concerning his action. A letter received April 4, 1997 informed the court that Petitioner had been having difficulty communicating with the people at Mack Alford Correctional Center concerning his funds on deposit there. He also enclosed a petition naming several respondents. The letter received April 7, 1997 informed that Petitioner had received $10.00 on his books and would therefore pay the $5.00 filing fee, however, no filing fee was tendered. A letter received April 15, 1997 informed the court that Petitioner

[1] Petitioner's petition failed to name an appropriate party as respondent. The *in forma pauperis* motion did not contain a certified copy of the trust fund account from each prison where the petitioner was confined.

had decided not to file a writ of habeas corpus. The Court construes the letter received April 15, 1997 as a motion to voluntarily dismiss the petition.

Based on Petitioner's representation that he does not wish to proceed, the undersigned United States Magistrate Judge RECOMMENDS that Petitioner's petition for writ of habeas corpus [Dkt. 1] be DISMISSED without prejudice.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 16th day of April, 1997.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 18th Day of April, 1997.

C. Portillos, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

BIZJET INTERNATIONAL SALES AND SUPPORT, INC.,

Plaintiff,

vs.

NORTHWEST JET SALES & LEASING, INC.,

Defendant.

Case No. 96-CIV-814-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

ENTERED this 17th day of April, 1997.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

22

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EVERETT K. TURNER,

Plaintiff,

v.

JOHN J. CALLAHAN,
Commissioner of Social Security,[1]

Defendant.

Case No: 95-C-857-H

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed April 16, 1997.

Dated this 16th day of April, 1997.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

[1]Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EVERETT K. TURNER,

Plaintiff,

v.

JOHN J. CALLAHAN, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 95-C-857-H

ENTERED ON DOCKET

DATE 4/18/97

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Commissioner of Health and Human Services ("Commissioner") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Stephen C. Calvarese (the "ALJ"), which summaries are incorporated herein by reference.

---

[1]Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

17

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant is not disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the second step of the sequential evaluation process.[3] He found that claimant met the disability insured status requirements of the Social Security Act on May 15, 1992, the date he claimed he became unable to work, and continued to meet them through March 31, 1994. He concluded that the claimant had a history of multiple mid-face fractures and a right

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[2]Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Commissioner's decisions. The Commissioner's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Commissioner's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3]The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

wrist fracture, an organic mental disorder, and a substance abuse disorder in remission. While noting that the claimant had alleged pain, headaches, losses of concentration, energy, and memory, balance difficulty, double vision, irritability; and nausea which prevented him from working, the ALJ found that the credible medical evidence did not establish an underlying medical condition so severe as to preclude work activity. He found that the testimony of claimant and his wife was credible only to the extent consistent with impairments that do not impose more than a minimal limitation on claimant's ability to perform work activities. Having determined that claimant did not have a severe impairment, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ failed to give substantial weight to the opinion of claimant's treating physician, Dr. Detwiler.

(2) The ALJ erred in failing to find that claimant's impairment met Listing 12.02 of the Listings of Impairments.

(3) The ALJ did not consider claimant's impairments in combination.

(4) The ALJ erred in failing to call a vocational expert.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that he has not been able to work since May 15, 1992, when he was injured in a motor vehicle accident (TR 134). He was ejected from the vehicle and sustained injuries to his right wrist, mid-face, and to his brain (TR 132-

150). On June 10, 1992, his doctor reported he had no complaints and was doing well (TR 153).

Dr. Karl Detwiler prescribed Lortab 7.5 for a severe headache on May 28, 1992 and found claimant was temporarily disabled for the next two months on June 5, 1992 (TR 167). The doctor made similar findings on August 31, 1992 and November 2, 1992 (TR 163-166). On November 2, 1992, Dr. Detwiler concluded claimant showed symptoms of "post concussive syndrome" and needed to see a neuropsychologist, Dr. Lukens (TR 161).

On January 15, 1993, Vicodin ES was prescribed by Dr. Detwiler for claimant's headache (TR 157). On March 8, 1993, Dr. Detwiler reported claimant had "cognitive deficits" and reported becoming impatient and hostile and having headaches and decreased short term memory, which precluded his return to work (TR 159). The doctor could find no physical causes of the symptoms (TR 159). On March 12, 1993, the doctor refused to refill any more narcotic analgesic prescriptions for claimant because he found no abnormality in a CT scan (TR 158).

Dr. Vanessa Werlla did a mental status evaluation of claimant on March 17, 1993, and found as follows:

> Based on the patient's response today to the Folstein Inventory, he does not show evidence of an organic or memory deficit problem, as he subjectively reports. He has been diagnosed in the past by Dr. Detwiler as having a post concussion syndrome which may possible [sic] apply, but there were no notes from Dr. Lucan to review, who has apparently been treating him for this diagnosis. I believe he also has a problem with a dependency on pain medication, particularly opioid-like medicine at this time. This needs to be addressed with the patient. I am unable to comment on whether his degree of physical limitation from his

> accident would place him in the range for eligibility for disability. Based on his mental status examination today, I do not see him as a candidate to receive disability based on that alone (TR 171-172).

On March 26, 1993, Dr. R. Smallwood completed a psychiatric review technique form and found that claimant had no medically determinable impairments or limitations (TR 53-61).

On June 28, 1993, Dr. Detwiler reported that claimant was doing better and had begun "cognitive re-training by a neuropsychologist" (TR 178). However, on November 22, 1993, the doctor reported that he had seen claimant and his wife and they reported "continued difficulty with temper outbursts, short-term memory and overall difficulty" associated with the headaches (TR 179). He was discharged by Dr. Detwiler at that time (TR 179). On that date, the doctor wrote: "I feel that [claimant] would be significantly benefited with evaluation and treatment . . . without this [claimant] will be unable to obtain gainful employment in the future" (TR 180).

Claimant was treated daily as an outpatient at Parkside Hospital from March 28, 1994 to April 15, 1994 (TR 182-223). The focus of his treatment was "working on anger and explosive outbursts" (TR 182). He participated in group meetings and was prescribed Tegretol (TR 182). His wife was involved in the treatment program too (TR 183). He told his counselor that he enjoyed hunting, playing snooker, and fishing once a month (TR 188).

On June 8, 1994, Dr. Joseph Fritsch conducted a neuropsychological evaluation of claimant (TR 224-235). Dr. Fritsch concluded:

Formal testing revealed deficiencies in several areas of neuropsychological functioning in this patient. Findings are felt to reflect residua of the patient's head injury as well as possible longstanding weaknesses. Results of intelligence testing indicated that the patient possesses relatively weak verbal comprehension abilities. This weakness probably is longstanding in nature in view of the patient's school performance and history of placement in speech classes. With regard to executive function residua, there were indications of mild initiation problems and the suggestion that the patient might encounter mild difficulty sustaining intentional responding in the face of competing response tendencies. This difficulty might contribute to the patient's appearing "distractible" or as having trouble concentrating. Residual memory impairment was seen principally in the results of a relatively complex verbal memory task. It is worth noting that verbal memory-test performance was not impaired in all instances. Overall, the degree of verbal memory difficulty experienced by the patient is regarded as mild. A defect in memory for faces was recorded, but it did not appear to be a reflection of generalized visual memory impairment. Auditory-verbal attentional capacity was borderline. Although not a brain injury-related difficulty, the patient's compromised right upper extremity function (e.g., diminished hand strength/dexterity) must be recognized. The patient's personality questionnaire responses indicated that he was experiencing considerable subjective emotional distress; some symptom exaggeration may have been involved.

. . . .

If the patient wishes to explore his options as far as return to work is concerned, it is recommended that he contact and work with a vocational specialist who is experienced in addressing the special needs of the traumatically brain-injured. Provided with the proper guidance and support services, he may be able to identify and prepare for a type of work at which he can succeed. If formal job training were to be deemed appropriate for this man, it is suggested that he would stand a greater chance of success with on-the-job training or a vocational-technical type of program than with an academic degree program.

(TR 234-235).

On June 15, 1993, Dr. S. Vaughere completed a psychiatric review technique form and found that claimant had no medically determinable impairments (TR 73).

A letter from DeeAnn Paisley, a counselor with the Oklahoma Department of Social Services, dated January 10, 1995 reported that she had been claimant's social worker since March 21, 1994, when his physical abuse of his daughter was reported and confirmed. (Attachment to Plaintiff's Opening Brief, Docket #12). Ms. Paisley reported that he had had an abnormal CAT scan and been placed on Tegritol. She stated that in June of 1994 his medication had been increased to control his verbal abuse, and in September of 1994 another child abuse incident had occurred.

A spect-brain scan on May 23, 1994 found an "overall abnormal decrease in metabolism and flow to the entire brain," most marked anteriorly and in the right side (TR 242). Dr. Michael Haugh prescribed Toradol for headaches, as well as Tylenol (TR 237). By August 24, 1994, the frequency of his headaches was lessening (TR 237). On November 21, 1994, Dr. Haugh reported continued improvement using Norvasc, Toradol, and amitriptyline at bedtime (TR 236).

There is no merit to claimant's first contention that the ALJ failed to give substantial weight to Dr. Detwiler's opinion. While not mentioning Dr. Detwiler by name, the ALJ referred to his records when he stated in his opinion: "[i]n mid-August 1992, claimant's headaches returned but he denied short-term memory difficulty. In November 1992, claimant's treating neurologist found no evidence of neurological deficit and claimant's memory was good. In March 1993, the neurologist ceased refilling claimant's narcotic analgesics." (TR 26).

Dr. Detwiler did not find claimant totally temporarily disabled from May 15, 1992 through at least November 22, 1993, as claimant contends. The doctor found him temporarily disabled from May 15, 1992 through February 1993 (TR 163-166). In November 1992, Dr. Detwiler referred him to Dr. Lukens (TR 161). On June 28, 1993, Dr. Detwiler reported he was "doing better." (TR 178). On November 22, 1993, the doctor reported that he was having temper outbursts, but nevertheless discharged him and said that, without treatment, he would be unable to obtain gainful employment in the future (TR 180). This was not a finding of total disability.

"A treating physician's opinion must be given substantial weight unless good cause is shown to disregard it." Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995). When the treating physician's opinion is not consistent with other medical evidence, the ALJ must examine the other medical evidence to determine if it outweighs the treating physician's report. Id. at 290. A treating physician's opinion regarding the severity of a claimant's impairments is generally favored over that of a consulting physician. Reid v. Chater, 71 F.3d 372, 374 (10th Cir. 1995).

The ALJ considered Dr. Detwiler's opinion, as well as claimant's other records, to conclude as follows: "the medical record is consistent with a mental disorder that does not impose more than a minimal limitation on claimant's ability to perform the mental demands and functions of work activities on a sustained basis." (TR 26).

There is no merit to claimant's second contention that the ALJ erred in failing to find that his impairment met Listing 12.02 of the Listings of Impairments. The

Listing requires documented persistence of at least one of certain symptoms, including personality change, mood disturbance, and emotional ability (e.g., explosive temper outbursts, sudden crying, etc.), which exist in claimant's case. However, the Listing requires, in addition, evidence of at least two of the following:

(1) Marked restriction of activities of daily living; or

(2) Marked difficulties in maintaining social functioning; or

(3) Deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or

(4) Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

None of the psychologists who have examined claimant have found marked restriction or difficulties in his personal or behavioral functioning. There is no evidence that he meets this part of the Listing. The ALJ correctly concluded that the medical record "reveals that claimant's intermittent explosive disorder has significantly improved with medication and therapy. There is no evidence that this disorder has been or is expected to be a long-term mental disorder." (TR 26).

There is also no merit to claimant's third contention that the ALJ did not consider all his impairments in combination. The ALJ stated: "[t]he claimant has also alleged severe disabling pain, headaches, losses of concentration, energy, and memory, balance difficulty, double vision, irritability, and nausea to the extent that he cannot engage in any work activities. In making the determination that claimant

does not have a 'severe' impairment, his subjective complaints have been given full consideration, both individually and in combination." (TR 26).

Finally, there is no merit to claimant's contention that the ALJ erred in failing to call a vocational expert. Because the record supports the ALJ's determination that claimant has no severe impairment, the ALJ was under no duty to obtain vocational expert testimony. Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992).

The ALJ complied with the Social Security Regulations in determining at step two of the decisionmaking process that claimant did not have a medically severe impairment or combination of impairments. This determination was governed by the Commissioner's severity regulations, 20 C.F.R. §§ 404.1520(c) and 416.920(c). The court in Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988), discussed this step two determination and found that it was to be based on medical factors alone, and did not include consideration of such vocational factors as age, education, and work experience.

> Pursuant to the severity regulations the claimant must make a threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities, i.e., "the abilities and aptitudes necessary to do most jobs." Presumptively, if the medical severity of a claimant's impairments is so slight that the impairments could not interfere with or have a serious impact on the claimant's ability to do basic work activities, irrespective of vocational factors, the impairments do not prevent the claimant from engaging in substantial gainful activity. If the claimant is unable to show that his impairments would have more than a minimal effect on his ability to do basic work activities, he is not eligible for disability benefits. If, on the other hand, the claimant presents medical evidence and makes the *de minimis* showing of medical severity, the decision maker proceeds to step three.

Id. (citations omitted).

The claimant has not shown that his impairments would have more than a minimal effect on his ability to do basic work activities. Dr. Werlla did not see him as a candidate to receive disability based on his limitations resulting from the accident (TR 171-172). Medical consultants, Dr. Smallwood and Dr. Vaughere, found he had no medically determinable impairments (TR 53-61, 73). Dr. Detwiler and Dr. Fritsch concluded that he would be able to work with treatment (TR 180, 224-235). His doctors have reported great improvement in his condition with medication (TR 214, 236-237).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 15th day of April, 1997.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\TURNER.SS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOHN C. LOVE,
Plaintiff,

vs.

McDONNELL DOUGLAS CORPORATION,
Defendant.

Case No. 96-CV-1173-K

STIPULATION OF DISMISSAL AS TO DEFENDANT TOM E. FULTNER

Plaintiff and Defendants stipulate pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure to the dismissal of this action as to Defendant Tom E. Fultner only. Plaintiff will proceed with this action against Defendant McDonnell Douglas Corporation.

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Attorneys for Defendants
Tom E. Fultner and
McDonnell Douglas Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JORDAN F. MILLER CORPORATION, a California corporation, and JORDAN F. MILLER, an individual, and AMERICAN EAGLE INSURANCE COMPANY, a foreign insurance corporation,	
Plaintiffs,	
vs.	Case No.: 95-C-469-B
MID-CONTINENT AIRCRAFT SERVICE, INC., an Oklahoma corporation, and JET CENTER TULSA, INC., an Oklahoma corporation,	
Defendants and Third-Party Plaintiffs	
vs.	
E.U. BAIN, JR.,	
Third-Party Defendant, Plaintiff,	
vs.	
VICTOR MILLER,	
Third-Party Defendant.	

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the undersigned, the remaining parties hereto, and stipulate to the Court that all claims of American Eagle Insurance Company against the defendants Mid-Continent Aircraft Services, Inc. and Jet Center Tulsa, Inc., their servants, agents and employees, including Douglas Jandebuer, Robert Jandebuer and James Jandebuer, may be dismissed with prejudice as to the refiling of the same.

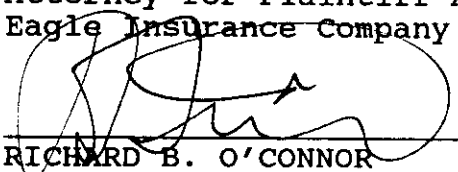
KENT WATSON
Attorney for Plaintiff American
Eagle Insurance Company

RICHARD B. O'CONNOR
Attorney for Jordan F. Miller
Corporation and Jordan F. Miller

JAMES C. DANIEL
Attorney for Defendants Mid-
Continent Aircraft Services,
Inc. and Jet Center Tulsa, Inc.

RICHARD T. GARREN
Co-counsel for Defendants Mid-
Continent Aircraft Services,
Inc. and Jet Center Tulsa, Inc.

KENT WATSON
Attorney for Plaintiff American Eagle Insurance Company



RICHARD B. O'CONNOR
Attorney for Jordan F. Miller Corporation and Jordan F. Miller

JAMES C. DANIEL
Attorney for Defendants Mid-Continent Aircraft Services, Inc. and Jet Center Tulsa, Inc.

RICHARD T. GARREN
Co-counsel for Defendants Mid-Continent Aircraft Services, Inc. and Jet Center Tulsa, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUISE B. BLACKBURN,

Plaintiff,

v.

TULSA COMMUNITY COLLEGE,

Defendant.

No. 96-CV-1091-H

ORDER

This matter comes before the Court on Plaintiff's motion to dismiss without prejudice, made orally at a status hearing on April 15, 1997. For good cause shown, this motion is hereby granted.

IT IS SO ORDERED.

This 15th day of April, 1997.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES VANDIVERE,

Plaintiff,

v.

MUNICIPAL CRIMINAL COURT of the CITY OF TULSA, et al.

Defendants.

No. 96-CV-1133-H

ORDER

A status hearing was scheduled in this case for April 15, 1997 at 1:40 PM. Plaintiff did not appear for this hearing. Attempts were made to reach Plaintiff by telephone, but his telephone number has been disconnected. Defendants did not appear at the hearing because they have not been served with process.

It appears that Plaintiff has abandoned his lawsuit. Accordingly, this case is dismissed without prejudice.

IT IS SO ORDERED.

This 15TH day of April, 1997.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY LYNN HART,

Plaintiff(s),

vs.

STANLEY GLANZ, *et al.*,

Defendant(s).

Case No. 96-CV-1165-H

ORDER

On January 14, 1997, Plaintiff filed a notice of dismissal stating as follows:

> It is my wish to withdraw this action as upon reconsideration I feel the complaint has no merit[.] Please dismiss this action at my request.

[Dkt. No. 4].

Pursuant to Plaintiff's request and pursuant to Fed. R. Civ. P. 41(a), this action is hereby **DISMISSED WITHOUT PREJUDICE.**

IT IS SO ORDERED.

Dated this 15TH day of April 1997.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARLOS E. SARDI, On Behalf of Himself and All Others Similarly Situated, Plaintiff, v. STRUTHERS INDUSTRIES, JOHN C. EDWARDS, G. DAVID GORDON, and MICHAEL B. FINE, Defendants.	Civil Action No. 94-C-787-H
JOAN DWORKIN, Plaintiff, v. STRUTHERS INDUSTRIES, INC., JOHN C. EDWARDS and G. DAVID GORDON, Defendants.	Civil Action No. 94-C-838-H

CONSENT JUDGMENT

This cause having come on to be heard on this 15TH day of APRIL, 1997, and plaintiffs and defendant Struthers Industries, Inc. ("Struthers"), appearing by their counsel of record, jointly submit this Consent Judgment to the Court for its approval. It appearing to the Court that:

1. Plaintiffs and defendant Struthers, along with the other defendants in the above-captioned actions (the "Actions"), entered into a Stipulation and Agreement of Compromise and

99

APPROVED AS TO FORM
AND CONTENT:

WOLF POPPER ROSS WOLF & JONES, L.L.P.

By: _____
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Attorneys for Defendants
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and John C. Edwards

KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, L.L.C.

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Attorneys for Defendants Struthers Industries, Inc. and John C. Edwards

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RADCO, INC.,
an Oklahoma corporation,

Plaintiff,

vs.

MOHAWK STEEL COMPANY, INC., an Oklahoma corporation; **SHELL OIL COMPANY**, a Delaware corporation; **FOSTER WHEELER USA, CORP.**, a Delaware corporation; **ABB LUMMUS GLOBAL INC.**, a Delaware corporation; **LYONDELL-CITGO REFINING COMPANY, L.L.C.**, a Texas limited liability company, **PETRO-CHEM DEVELOPMENT CO., INC.**, a Delaware corporation; and **MARATHON OIL COMPANY**, an Ohio corporation.

Defendants.

ENTERED ON DOCKET
APR 17 1997
DATE _____

CIVIL ACTION NO. 93-C 1102H

FILED

APR 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL WITHOUT PREJUDICE

Radco, Inc. (Radco"), having filed its Complaint against Mohawk Steel Company, Inc. ("Mohawk"), and Mohawk having filed counterclaims against Radco and Mohawk having resolved their differences and moved for entry of this Order,

IT IS ORDERED, ADJUDGED and DECREED that all claims and counterclaims that have been brought herein by Radco against Mohawk or by Mohawk against Radco are dismissed without prejudice. This Court retains jurisdiction over disputes concerning the Settlement Agreement.

Signed this 15th day of April, 1997.

UNITED STATES DISTRICT JUDGE

We agree to the entry of the
Order of Dismissal Without Prejudice:

Counsel for
MOHAWK STEEL COMPANY, INC.

Counsel for
RADCO, INC.

CERTIFICATE OF SERVICE

I certify that on the _____ day of _____, 1997, a true and correct copy of the above and foregoing Order of Dismissal Without Prejudice (Mohawk Steel Company, Inc.) was mailed, via first class mail, with postage thereon fully prepaid, to the following counsel of record:

Angelyn L. Dale, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM L. WALDROP,

Petitioner,

vs.

RITA MAXWELL, WARDEN,

Respondent.

No. 96-CV-449-B

ORDER

The Court has for decision Petitioner's *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The Petitioner is presently incarcerated pursuant to Judgment and Sentence entered in the District Court in and for Tulsa County, Oklahoma, in Case Nos. CF-88-3215 and CF-88-3216. The Petitioner pled no contest to the charges of Attempted Robbery (Count I), Unauthorized Use of a Motor Vehicle (Count II), Knowingly Concealing Stolen Property (Count III), Possession of a Controlled Dangerous Substance (Count IV), and Feloniously Pointing a Weapon (Count V), all after two prior felony convictions, in Case No. CF-88-3215. Petitioner pled no contest to Possession of a Firearm After Conviction of a Felony in Case No. CF-88-3216. Petitioner was found guilty and sentenced to thirty-three years on each count in each case, to run concurrently. At the time of his plea, Petitioner was represented by retained counsel and was properly advised of his right to jury trial, right to cross-examine witnesses, right not to testify or to testify if he so desired, and the

(8)

government's obligation to prove his guilt beyond a reasonable doubt by independent evidence. Petitioner was advised of his rights to appeal and Petitioner did not file a direct appeal.

Petitioner filed an application for post-conviction relief in the District Court in and for Tulsa County, Oklahoma, in 1995. As his single ground for relief, Petitioner asserted one of the prior felony convictions used to enhance his sentence, a felony conviction in the State of Arizona, was not a felony under the laws of the State of Oklahoma so it was not valid for purposes of enhancement.[1] Petitioner's post-conviction application was denied by the trial court. Petitioner appealed the District Court's denial of his requested post-conviction relief to the Oklahoma Court of Criminal Appeals which, on February 26, 1996, remanded the case to the District Court for a proper order with Findings of Fact and Conclusions of Law concerning the validity or lack thereof of the Arizona felony conviction for enhancement.

The District Court complied with the order of the Court of Criminal Appeals, held a hearing, and entered Findings of Fact and Conclusions of Law denying Petitioner's post-conviction application. On May 1, 1996, the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of Petitioner's application for post-conviction relief. The Petitioner has exhausted his claim of relief as raised in his request for post-conviction relief.

The record reveals that the trial court in the cases numbered CF-88-3215 and CF-88-

[1]The other felony conviction used for purposes of enhancement occurred in the State of Illinois and was not disputed.

3216 used a conviction from Arizona for "aggravated assault" under 13 A.R.S. § 1204 to enhance Petitioner's punishment.[2] The Arizona statute for "aggravated assault" lists eleven possible ways to commit a violation of this statute; only four of which would be felonies in Oklahoma. The record herein provided does not reflect under what subsection of 13 A.R.S. § 1204 Petitioner was convicted.

Thus, the specific question presented is whether the crime for which Petitioner was convicted in the State of Arizona was a felony under Oklahoma law at the time the offense was committed. Fischer v. State, 483 P 2d 1165 (Okla.Cr. 1971).

The record of the hearing conducted by the District Court of Tulsa County, Oklahoma, on April 4, 1996, without objection, reveals the following: William Louis Waldrop ("Waldrop"), Petitioner herein, was convicted in the Superior Court of Arizona, Maricopa County, of the crime of Aggravated Assault, a Class 3 felony, in violation of A.R.S. §§ 13-701, 801, 808, 1203 and 1204, on October 30, 1986, and was sentenced to five years probation. The evidence in support of the conviction revealed that following a vehicle traffic dispute in Maricopa County, Arizona, in which Waldrop and one Stanford were participants, Waldrop attacked Stanford with a two-foot long steel pipe[3] in a menacing

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[2]If Petitioner were to prevail concerning the alleged invalid enhancement, his sentencing range would be for not less than 10 years for one After Former Conviction of a Felony instead of not less than 20 years for after two former convictions of a felony. Okla.Stat. tit. 21, § 51. In either event, the ultimate 33 year concurrent sentence was within the lawful range.

[3]A 23" x 1" heavy steel pipe with a 1½" reducing elbow on the end and duct tape on the other end.

fashion, striking him on the left arm and on the upper back and head. Waldrop's aggravated assault of Stanford was witnessed by two City of Phoenix police officers and five other witnesses. Although having previously pled no contest, at the Tulsa County District Court hearing Waldrop denied striking Stanford with the steel pipe and stated he only struck Stanford's vehicle with the pipe. The record reveals overwhelming evidence to the contrary that Waldrop did strike Stanford.

After conducting the evidentiary hearing on remand, and considering the facts underlying the Arizona conviction, the trial court specifically found that "had this event occurred within the State of Oklahoma, the appropriate charge would have been Assault and Battery with a Dangerous Weapon, a felony under Okla.Stat. tit. 21, § 645 (1991)."[4] The trial court properly found the Petitioner's improper enhancement allegation was without merit and was affirmed by the Oklahoma Court of Criminal Appeals. Despite Petitioner's failure to file a direct appeal or raise the "invalid enhancement" issue earlier, the District Court in and for Tulsa County specifically addressed Petitioner's claim and properly found it without

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[4]Okla.Stat. tit. 21, § 645 in pertinent part states:

> "Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault, battery, or assault and battery upon the person of another with any sharp or dangerous weapon, * * * with intent to injure any person, although without the intent to kill such person, * * * upon conviction is guilty of a felony * * *."

The trial judge found the Arizona charge clearly fell under A.R.S. § 13-1204 A-2 "Aggravated assault; classification A-2. If such person uses a deadly weapon or dangerous instrument."

merit, as did the Oklahoma Court of Criminal Appeals.

This Court concludes the Findings and Conclusions of the trial court and the affirmance of the Oklahoma Court of Criminal Appeals is supported by the record and appropriate. Petitioner's application for a Writ of Habeas Corpus is hereby denied.

DATED this 15th day of April, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JACQUELYN M. KOMAR,

Plaintiff,

v.

JOHN J. CALLAHAN,
Commissioner of Social Security,[1]

Defendant.

Case No: 95-C-320-W

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed April 14, 1997.

Dated this 14th day of April, 1997.

JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

[1]Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action.

15

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JACQUELYN M. KOMAR,

Plaintiff,

v.

JOHN J. CALLAHAN, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 95-C-320-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of Judge Stephen C. Calvarese (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not

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[1] Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

14

disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that claimant's testimony was credible to the extent that it was consistent with a residual functional capacity of light work, with some additional limitations, and concluded that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work as so limited.[4]

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[2] Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Commissioner's decisions. The Commissioner's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Commissioner's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

[4] Claimant's exertional capacity was carefully measured in connection with a "work hardening" program in which she extensively participated. Relying on those records, the ALJ found that claimant could frequently lift and carry a lifting range of

The ALJ found that the claimant was unable to perform her past relevant work as a nurse's aide, was 27 years old, which is defined as a younger individual, had a 12th grade education, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. The ALJ concluded that there were a significant number of jobs in the national economy which claimant could perform, such as assembly and cashier (TR 32). Having determined that there were a significant number of jobs in the national economy that claimant could perform, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ erred in concluding that claimant only suffers a mild to moderate mental impairment and ignoring her inability to deal with the public.

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6 inches to 72 inches, had a range of motion moderately decreased in the lumbar spine, a grip strength of 53 pounds on the right, 51 pounds on the left, was right-handed; and had an ability to pinch, lift 45 pounds from the floor to 48 inches, lift 25 pounds from the floor to 66 inches, carry 38.2 pounds at waist level, ride a bike for 7 minutes, walk on a treadmill for 15 minutes, sit 1 hour at a time, lift 22.5 pounds from the floor to 72 inches, carry 23 pounds and 280 feet, push 164 pounds 420 feet, pull 40 pounds 280 feet, stoop for 3 minutes, and squat for 3 minutes (TR 35, referring to TR 174-177). Relying upon the consultative medical examination conducted by Psychiatrist Thomas A. Goodman, M.D., the ALJ also recognized diagnoses of atypical anxiety disorder, depressive disorder-atypical, somatoform disorder-atypical, but found that Claimant has retained her basic intellectual abilities, and that her mental status was normal except for mild to moderate depression, noting that she remembered 3 items after 2 minutes, and could compute the number of nickels in $1.35 (TR 35, referring to TR 397-399). The ALJ concluded that claimant was further limited by overall mild-moderate depression, and mild to moderate impairment of social functioning and concentration (TR 37-38).

2) The ALJ improperly rejected the treatment records and evaluation of claimant's counselor at the Star Community Mental Health Center, thereby violating § 12.00(D) of the Social Security regulations.

(3) The ALJ improperly gave reduced weight to the treatment records from Eastern State Hospital.

(4) The ALJ improperly disregarded evidence from Eastern State Hospital regarding claimant's alcohol and drug abuse.

(5) The ALJ erred in relying on Dr. Goodman, the consultative examiner's, evaluation on December 10, 1992, and ignoring the recommendation from that evaluation that claimant be reassessed in six to twelve months.

(6) The ALJ improperly determined claimant's exertional limitations by relying on the physical capabilities that she demonstrated at physical therapy sessions on April 11, 1990, not the physical therapy sessions on May 23, 1991 and June 5, 1991.

(7) The ALJ ignored Dr. Simmon's assessment for workers compensation purposes that claimant only has 50% normal forward flexion of the lumbar spine and experiences constant pain and weakness.

(8) The ALJ improperly rejected the opinion and treatment records of Dr. Sorensen which found that claimant was disabled.

(9) The ALJ improperly evaluated claimant's credibility and improperly applied the Luna factors that support her allegations of disabling pain.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant alleges disability beginning on July 1, 1990, due to back, neck and

left hand pain and numbness, depression, and fibromyalgia.[5] (TR 122). She was working as a nurse's aide at a nursing home on that date and injured her back while transferring a patient from the commode to the bed (TR 122, 549). She has not been employed since that time, except for two days in 1992 as a laundry worker, which caused her so much pain that she had to quit (TR 144, 734). For the period July 2, 1990 to August 12, 1991, the Oklahoma Workers' Compensation Court found her totally disabled (TR 109).

From the record, it is not apparent on what date claimant began seeing Dr. Terrill H. Simmons, since the first treatment record is on July 24, 1990 and says that claimant "returns today" (TR 326). On August 14, 1990, a CAT scan of her back was normal, and a myelogram showed a bulging disc at L4-L5, but no herniated disc (TR 155-59).

Claimant attended outpatient physical therapy at St. Johns Medical Center in the aqua exercise program three times a week from July to October 1990 (TR 288-304). Because the water was cold, it made claimant's muscles tense and she made slow progress (TR 295). She was changed to Eastern Oklahoma Physical Therapy in October of 1990 (TR 324) and received therapy there until February of 1991 with "fair results" (TR 202, 323-324). Dr. Simmons wrote on February 13, 1991 that she was released from work hardening and "should be able to return to work within about a month." (TR 322). She attended a total of thirty physical

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[5] "Fibromyalgia" is defined in Tabers Cyclopedic Medical Dictionary as "chronic pain in muscles and soft tissues surrounding joints."

Due to claimant's allegations of increasing back and left leg pain in April of 1991, she was sent to physical therapy at St. Johns Medical Center for reassessment and evaluation from May 20, 1991 to June 5, 1991 in eight visits (TR 319-320, 337-341). On June 6, 1991 tests showed that her range of motion had significantly decreased since testing performed on April 11, 1991 (TR 337, 174). Physical therapy sessions dated May 23, 1991 and June 5, 1991 revealed tenderness and regression in limitation of functions, along with complaints of pain and tingling (TR 337-340). By June 17, 1991, Dr. Simmons wrote that she moved easily around the examination room, although she had limitation of motion in her back (TR 319).

On July 15, 1991, Dr. Simmons wrote that she had reached a plateau and "[s]he needs to be careful returning to work. I strongly suggested a vocation that involves Class I-II sedentary type of activity, rather than a vocation that has lifting, bending and stooping." (TR 314).

On July 25, 1991, Dr. Simmons concluded that claimant had a total of 13% disability for Workmens Compensation purposes, including a 7% impairment for a disc injury plus 1% for a second disk. He noted that she had full extension and lateral bending, but only 50% normal forward flexion of the thoracolumbar spine, for an additional 2% impairment. In addition, he found a 1% impairment as a whole as a result of the pneumothorax, which was resolved, and a 2% impairment based on constant pain and weakness. The doctor stated: "[p]atient's condition has stabilized and she is released from care with a final diagnosis as listed above."

(TR 318). Dr. Simmons noted that a repeat CAT scan showed no disc herniation (TR 316).

On July 28, 1991, Dr. Jimmy Martin also provided a temporary disability impairment rating for claimant (TR 305-307). He determined that she had a 50% permanent partial impairment for the period from July 2, 1990 to July 15, 1991 (TR 305-306). The calculation was based on 23% due to a limited range of motion, 5% due to a non-operative disk lesion at L4-L5, 12% due to sensory nerve root injury affecting her legs, and 10% due to injury to the dorsal-thoracic nerves, T-6 to T-10, bilaterally. (TR 306). Consideration was also given to chronic weakness and decreased function of the back. (TR 306).

Dr. Martin recommended that claimant undergo "vocational rehabilitation in order to learn a more sedentary type of employment." (TR 306). Since Dr. Martin was not a treating physician and his rating directly contrasted with the treating doctor, Dr. Simmons', assessment of 13% disability, the ALJ disregarded it and assessed it "with substantially less weight." (TR 27).

After discharge from Dr. Simmons' care, claimant began seeing a variety of doctors at OU Adult Medicine Clinic. (TR 354-385). On November 14, 1991, she received her first diagnosis of fibromyalgia (TR 373). On January 10, 1992, Dr. Mark S. Thomas found that claimant had lumbar disk disease, ulnar nerve irritation, and possible left side carpal tunnel syndrome. (TR 366). On March 10, 1992, Dr. Timothy Lind found no significant bone, joint, or soft tissue abnormality in x-rays of claimant's left shoulder and joints (TR 362).

On March 17, 1992, Dr. Thomas referred claimant to Dr. Scott J. Dunitz to evaluate her left shoulder pain due to falling on a doorway and hitting the shoulder (TR 350-351). He concluded that she had possible bursitis of the shoulder (TR 350). Borderline evidence of carpal tunnel syndrome was found in an electromyographic study on May 4, 1992 (TR 347). She saw Dr. Dunitz for injections and medications until July 13, 1992 (TR 347-350).

On September 25, 1992, Dr. Richard G. Cooper examined claimant on behalf of the Social Security Administration (TR 391-394). She walked with a "good gait . . . with no assistive device." (TR 392). The doctor stated:

> [i]n the musculoskeletal exam the range of motion of the cervical spine-voluntarily on the part of the patient there were some limitations. However, by observation I saw her to flex full range and passively on the part of the doctor, I got the full range of rotation, right and left, and she did full range on right and left side-bending by herself and I had the extension at 30 degrees. Thoracolumbar spine - right side-bending 30 degrees, left side-bending 20 degrees. Flexion of the thoracolumbar spine - she will only go to 45 degrees. Now let me point out that all ranges of motion tests she tends to resist the motion whether she is doing the test actively on her own part or whether it is passive with the doctor being active. There is a trembling resistance to all of these ranges of motion and in the forward bending of the thoracolumbar spine, this is no exception. She says all of these things hurt but in my opinion it is poor relaxation of musculature. The knees had full range of motion. The shoulders had full range of motion but she complained of pain in the left shoulder doing those tests. The hips have full range but again she only grudgingly allows motion with a trembling resistance of the muscles but has full range. Ankles full range. Wrists full range. Elbows full range. Fingers full range.

(TR 393).

Claimant testified at the hearing on October 28, 1993 that her problems

became worse in early 1993 (TR 742). She said she began falling as often as three times a day two or three times a week due to problems with her left leg, and that due to pain she cannot stoop, bend or lift (TR 738). Her husband concurred in her testimony that she often falls down. (TR 763). Claimant alleged that, since problems with her left leg caused her to fall, as on March 10, 1992, May 8, 1993, and May 24, 1993, she sometimes uses a cane or a crutch. (TR 343, 431, 738).

Claimant was treated at the Pain Institute of Tulsa by Dr. Raymond Sorensen from April 5, 1993 to October 21, 1993, following a head and neck injury as a result of an automobile collision on March 13, 1993. (TR 421-436). The ALJ reviewed the doctor's records and determined that he was treating claimant for fibromyalgia (TR 34), but claimant testified that he mostly treated her for the head injury and was "trying to help me with my fibromyalgia as much as he can, but he don't have a history of the problems, past problems." (TR 739).

Dr. Sorensen found no spinal disorders other than those related to fibromyalgia (TR 432). He gave the claimant several trigger point injections for pain and a spinal epidural (TR 421-436). On October 27, 1993, the doctor opined that "at this time it is unlikely that she will be able to maintain full time employment in the future." (TR 646). He based this on his findings that she had developed symptoms compatible with fibromyalgia and had pain "associated with the non-rheumatoidal arthritis condition." (TR 646).

On December 10, 1992, claimant was psychiatrically evaluated for the Social Security Administration by Dr. Thomas A. Goodman (TR 397-401). The

doctor found that she had a history consistent with some type of depressive disorder or an atypical anxiety disorder (TR 398). She had experienced some panic-like episodes and also had a possible somatoform disorder (TR 398-399). The doctor recommended psychiatric treatment (TR 399). He concluded that if her depression and anxiety could be stabilized, he could see no reason why she would "not be able to soon return to some kind of gainful employment." (TR 399).

On December 16, 1992, claimant was evaluated for the Social Security Administration and a Psychiatric Review Technique Form filled out (TR 86-93). The doctor found that claimant had affective and anxiety related disorders (TR 86). He found that she had moderate restriction of daily activities and difficulties in social function and often had deficiencies of concentration leading to failure to complete tasks (TR 89). He found moderate limitations in ability to understand, remember, and carry out detailed instructions and ability to interact appropriately with the public (TR 91-92). He concluded: "[c]an perform simple tasks and some complex with routine supervision. Can relate to coworkers and supervisors for work purposes. Will have trouble relating well with the public." (TR 93).

Claimant began seeing Cynthia Rori, a masters level counselor at Star Mental Health Clinic, on May 20, 1993 and was counseled there for depression related to her pain until November 4, 1993 (TR 655-690). On June 7, 1993 Ms. Rori diagnosed claimant as having "311.00 Depression NOS" (TR 685). On November 4, 1993, Ms. Rori evaluated claimant and found that her level of functioning fluctuated, which would "make it difficult for her to be involved in

sustained employment." (TR 660). Her pain had led to "anger, resentment and depression which unfortunately makes the pain worse." (TR 660). The conclusions were based on sessions with claimant, but "[n]o formal assessments have been made." (TR 660). Ms. Rori's notes supported a finding of mild to moderate depression and a somotaform disorder, which exists when there are "physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms." 20 C.F.R. Pt. 404, Subpt. P. App. 1, § 12.07.

Claimant was admitted to Eastern State Hospital on September 25, 1993, following an altercation with her boyfriend and heavy drinking, after being evaluated at Parkside for "intense suicidal ideation with intent to overdose." (TR 640). She had a G.A.F. score on admission of 25[6] and was determined to have a depressive disorder (TR 640-643). Evidence of claimant's alcohol abuse and drug use appeared for the first time in these records. (TR 634-635). She was treated for five days and when released was found to be "alert . . . oriented . . . cooperative." (TR 636). Dr. Garrett B. Ryder performed a physical evaluation of claimant for Parkside and found a full range of motion with a reduction of

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[6] The GAF is a "global assessment of functioning." The court in Irwin v. Shalala, 840 F. Supp. 751, 759 n.5 (D. Or. 1993), described the significance of a GAF score:

> The Global Assessment of Functioning Scale ("GAF") ranges from 90 (absent or minimal symptoms) to 1 (persistent danger of severely hurting self or others, or unable to care for herself). A score between 41 and 50 is defined as manifesting "serious symptoms" (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

sensation in some areas (TR 644-645). The doctor questioned whether his findings were "truly consistent with fibromyalgia." (TR 645).

The ALJ evaluated claimant's mental impairment and completed the Psychiatric Review Technique Form ("PRT Form") based on the diagnoses from Dr. Goodman and Eastern State Hospital (TR 28-29, 32, 40-43). He determined that Ms. Rori was not a licensed practicing psychologist or psychiatrist, but rather a mental health care professional, so her opinion did not fall under the social security definition of an acceptable source (TR 29). The ALJ decided to give her opinion "a substantially reduced weight" (TR 29). The ALJ noted that it was not clear what Ms. Rori's qualifications were and that her notes were "generally concerned with complaints rather than diagnoses." (TR 29).

The ALJ concluded that claimant had only a slight degree of limitation with respect to her activities of daily living, since the medical evidence did not demonstrate that pain limited her to the extent that she alleged. He found that she had a slight degree of limitation with respect to difficulties in maintaining social functioning, since her daily activities indicated that she can get around and it was only her perception of her problems physically rather than mentally which caused restrictions in her social functioning. He concluded that she seldom had deficiencies of concentration, persistence or pace, since the evaluation of Dr. Goodman did not show significant deficiencies in her concentration ability and the records from Eastern State Hospital did not show reduced mental abilities. Finally, the ALJ concluded that she never had experienced episodes of deterioration or

decompensation in work or work-like settings, since her admission to Eastern State Hospital was brought on by an argument at home with her fiancé when she was inebriated. (TR 32-33).

There is no merit to claimant's first contention that the ALJ erred in concluding that claimant suffers only a mild to moderate mental impairment and ignoring her inability to deal with the public. There are no psychological records or evaluations which show more than mild to moderate psychological problems. Dr. Goodman concluded that with counseling she should be able to return to work (TR 399). Cynthia Rori opined that her level of functioning fluctuated, which might make it difficult for her to hold a job, but Ms. Rori was not a trained psychologist or psychiatrist and admitted she had made no formal assessments. (TR 660). Claimant's admission to Eastern State Hospital was caused by personal and financial problems and related substance abuse, and she required only five days of treatment (TR 636-640). None of claimant's medical doctors found that her psychological problems were severe. The ALJ's conclusion regarding her mental condition was supported by substantial evidence.

The ALJ did not, as claimant argues, fail to ask the vocational expert at the hearing to consider claimant's somewhat limited ability to deal with the public (TR 769). He asked about jobs requiring dealing with the public, and the vocational expert stated that such jobs would be "considered to be stress producing" and if claimant could only handle minimal stress, there would be a significant reduction in the number of jobs she could perform (TR 769-770).

There is also no merit to claimant's second contention that the ALJ improperly rejected the treatment records and evaluation of claimant's counselor at the Star Community Mental Health Center. The ALJ discussed the records and merely gave them "substantially reduced weight," because the counselor, Ms. Rori, was not a practicing psychologist or psychiatrist and her status was unclear, so she did not appear qualified to make diagnoses, and her notes were "generally concerned with complaints rather than diagnoses." (TR 29). As already discussed, Ms. Rori based her conclusions on sessions with claimant, not formal assessments. (TR 660).

"[T]he Act makes clear that the Secretary must consider all relevant medical evidence of record in reaching a conclusion as to disability." Ray v. Bowen, 865 F.2d 222, 226 (10th Cir. 1989) (emphasis added). The ALJ considered the records of Community Mental Health Center, as required by Social Security regulation § 12.00(D), but gave clearly-stated reasons for giving them less weight than the evaluation at Eastern State Hospital and Dr. Goodman's evaluation, which was "not inconsistent with the Eastern State diagnosis but rather adds to it and is more definitive and more detailed in its findings" (TR 32, 397-401, 634-645). The ALJ's findings that claimant only suffered mild to moderate depression and a provisional somatoform disorder which were not totally disabling was supported by substantial evidence in the record.

There is no merit to claimant's third and fourth contentions that the ALJ improperly gave reduced weight to the treatment records from Eastern State

Hospital and disregarded evidence in those records of claimant's alcohol and drug abuse. As just discussed, the ALJ considered these records, along with Dr. Goodman's assessment, when filling out claimant's psychiatric review technique form (TR 32-33).

Claimant contends that she was discharged from Eastern State Hospital with a G.A.F. of 25, when in fact she was admitted with a G.A.F. of 25 (TR 635-636). She argues that she was found to be chronically mentally ill while there, but actually she received a diagnosis of a chronic depressive disorder (TR 640-43). In addition, her admission to the hospital had no bearing on her ability to maintain employment, but was a result of an altercation with her boyfriend and excessive drinking (TR 634).

As to claimant's abuse of drugs and alcohol, the ALJ noted that this was only mentioned once in the record and "it did not, based upon other evidence, appear to be a continuing problem." (TR 33). This was an accurate evaluation of the records.

The court also notes that Public Law Number 104-121, 110 Stat. 847 (1996), was enacted by Congress on March 29, 1996. Section 105 of that law amended certain provisions of the Social Security Act and provides, in pertinent part, that: "[a]n individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." P.L. No. 104-121, § 105(a)(1). The amendment applies to any

individual who applies for, or whose claim is finally adjudicated by the Commissioner of Social Security with respect to, benefits under Title II of the Social Security Act based on disability on or after the date of the enactment of the Act. Thus, if this court were to determine that the ALJ had not taken Claimant's alcohol or drug abuse sufficiently into consideration, and were to remand for that purpose, and if the ALJ on remand were to determine that drug or alcohol abuse was material to claimant's disability, she would then not be considered to be disabled under the new law. The ALJ did not find evidence of such continuing abuse, and the court finds that this was a proper conclusion.[7]

There is also no merit to claimant's contention that the ALJ erred in relying on Dr. Goodman's consultative evaluation dated December 10, 1992, and ignoring the doctor's recommendation that claimant be reassessed in six to twelve months. Dr. Goodman is a trained psychologist and did a thorough evaluation (TR 397-

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[7] The records from Eastern State Hospital, dated September 25, 1993 state:

> **ALCOHOL AND DRUG HISTORY:** The patient started using substances in her middle teenage years. She routinely drank a twelve-pack of beer every other day until approximately February of this year, when she reduced her drinking to about one to two beers a week. The longest time she has been sober is about six months. She has also tried marijuana, LSD, Cocaine and crank, orally, inhalant form and smoking. She has a history of blackouts and "shakes" with alcohol.

Given the extensive record presented; the fact that this reference to Claimant's alcohol and drug history is the only such reference; and the further fact that this entry also states that the Claimant has controlled her drinking, and that the drug use was experimental, and dated back to her teenage years, the conclusion of the ALJ is supported by substantial evidence.

399). The doctor's conclusions were not inconsistent with the claimant's diagnosis at Eastern State Hospital, but more definitive and detailed, as the ALJ noted (TR 32). The evaluation at Eastern State Hospital was done nine months later in September of 1993 (TR 635-636).

There is no merit to claimant's sixth contention that the ALJ improperly determined her exertional limitations by relying on the capabilities she showed following treatment on April 11, 1991 (TR 174-179), instead of findings six weeks later on May 23, 1991 and June 5, 1991, which showed increased tenderness, pain, and limitations of functions (TR 337-340). While claimant may have suffered increased problems in late May of 1991, Dr. Simmons noted that she moved easily around the exam room on June 17, 1991 (TR 319). After further treatment, Dr. Simmons reported on July 15, 1991 that she could do sedentary work (TR 314) and on July 25, 1991 that she was only 13% disabled for workmens compensation purposes (TR 316).

There is no merit to claimant's seventh contention that the ALJ ignored Dr. Simmons' assessment for workers compensation purposes that she had only 50% normal forward flexion of her lumbar spine and experienced constant pain and weakness. The ALJ specifically reviewed Dr. Simmons' notes in June of 1991 that she could move easily in the office despite lumbar pain (TR 33). He noted that "[e]ven Dr. Simmons was of the opinion that the claimant had a residual functional capacity which was roughly comparable to sedentary or perhaps a portion of light." (TR 33). The limitations which the ALJ found in her ability to do

light work were based on her back pain and strength limits (TR 33, 37-38). He also relied on Dr. Cooper's findings that she had a full range of motion of most joints, but resisted the motion studies, indicating she was "attempting to defeat the examination and show herself as having less physical capacity than she actually had." (TR 33, 393).

There is also no merit to the claimant's eighth contention that the ALJ improperly rejected the opinion and records of Dr. Sorensen which found that claimant was disabled. The ALJ discussed the doctor's reports fully (TR 28-29). He recognized that the doctor was one of claimant's treating physicians, who treated her "primarily for fibromyalgia and made no comments concerning any spinal problems other than as related to fibromyalgia." (TR 34). He noted that the doctor gave her "facet blocks which worked and worked with her on her headaches which demonstrated improvement." (TR 34).

The ALJ concluded that Dr. Sorensen's opinion that she was unable to work "is not consistent with the weight of the medical evidence," was an accommodation opinion, and "cites no basis demonstrating what capabilities the claimant has." (TR 34). He noted that the doctor wrote that claimant had a non-rheumatoidal arthritis condition, but such a condition was never diagnosed in his medical entries. (TR 34). The Eastern State Hospital evaluations at about the same time did not conclude that she could not work (TR 34). In addition, the ALJ noted that since Dr. Sorensen based his opinion on claimant's complaints of pain, it was reduced in weight since Dr. Goodman found that claimant had a provisional

somatoform disorder (TR 34).

"A treating physician's opinion must be given substantial weight unless good cause is shown to disregard it." Goatcher v. U.S. Dept. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995); Reyes v. Bowen, 845 F.2d 242, 244-45 (10th Cir. 1988). Good cause to disregard a treating physician's opinion may be shown if such an opinion is inconsistent with substantial evidence in the record. Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). The ALJ correctly found good cause to disregard the opinion of Dr. Sorensen since it was based on claimant's subjective complaints, not objective findings, and was not supported by other evidence in the record and stated his reasons for disregarding the opinion.

There is no merit to claimant's final contention that the ALJ improperly evaluated the credibility of claimant's pain complaints and failed to apply the Luna factors that support her claims of disabling pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66

(10th Cir. 1987), discussed the factors in addition to medical test results that agency decision makers should consider when judging the credibility of subjective claims of pain greater than that usually associated with a particular impairment.

> [W]e have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems . . . [and] the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive.

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Not only must the ALJ consider the factors set out in Luna, but he must discuss the specific evidence relevant to each factor which leads him to conclude that a claimant's subjective complaints are or are not credible. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995).

Because there was some objective medical evidence to show that plaintiff had physical problems producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The ALJ listed the factors set out in Luna which are to be considered in

judging a claimant's complaints of pain (TR 31, 35). He discussed her frequent visits to see doctors and the fact that she underwent physical therapy and work hardening resulting in improvement. (TR 26-29). Ms. Rori recommended chronic pain meetings, but claimant only attended once (TR 30, 661-682). He noted that tests showed she had no herniated discs or impingement on her spinal nerves. (TR 33). Her treating doctors made few restrictions on her activities (TR 33). He noted that Dr. Cooper found her uncooperative with motion studies (TR 33). He pointed out that claimant's medications and other forms of pain control were effective in reducing pain (TR 34). He noted that the physical therapist made objective measurements in April of 1991 which showed that claimant could work (TR 33).

It has been recognized that "some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987). Credibility determinations are generally binding upon review. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). There is substantial evidence to support the ALJ's conclusion that claimant's complaints of disabling pain were not credible.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 11th day of April, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID W. HOLDEN, an individual, and HOLLIMAN, LANGHOLZ, RUNNELS & DORWART, an Oklahoma corporation,

Plaintiffs,

vs.

EMERALD SERVICES CORPORATION, a Delaware corporation, and LOEHR H. SPIVEY, a/k/a LARRY SPIVEY, an individual,

Defendants.

Case No. 94-C-1021-BU

ENTERED ON DOCKET

DATE APR 16 1997

JUDGMENT

This matter was tried before a jury from December 11, 1995 through December 20, 1995, the Honorable Michael Burrage presiding. In accordance with the jury verdict rendered on December 20, 1995, judgment is hereby entered as follows:

As to the Amended Complaint

1. In favor of defendants, Emerald Services Corporation ("Emerald") and Loehr H. Spivey, a/k/a Larry Spivey (Spivey"), and against plaintiffs, David W. Holden ("Holden") and Holliman, Langholz, Runnels & Dorwart ("HLRD") on Count I of the Amended Complaint brought pursuant to Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission.

2. In favor of defendants Emerald and Spivey and against plaintiffs Holden and HLRD on Count III of the Amended Complaint brought pursuant to *Okla. Stat.* tit. 71, § 408(a)(2).

3. In favor of defendants Emerald and Spivey and against plaintiffs Holden and HLRD on Count IV of the Amended Complaint for common law fraud and statutory fraud.

4. In favor of plaintiff HLRD and against defendant Emerald on Count V of the Amended Complaint for breach of contract, assessing actual damages in the amount of $20,000, exclusive of pre-judgment interest, which has accrued at 8.5% in accordance with the terms of the underlying note.

5. In favor of defendants Emerald and Spivey and against plaintiff Holden on Count VI of the Amended Complaint for slander *per se*.

6. In favor of defendants Emerald and Spivey and against plaintiff Holden on Count VII of the Amended Complaint for libel *per se*.

As to the Counterclaims

7. In favor of defendant Emerald and against plaintiffs Holden and HLRD on Count II of Emerald's counterclaim for legal negligence, assessing no actual damages.

8. In favor of defendant Emerald and against plaintiffs Holden and HLRD on Counts III and VI of Emerald's counterclaim for breach of fiduciary duty, assessing actual damages in the amount of $233,731.00 and no punitive damages.

9. In favor of plaintiff HLRD and against defendant Emerald on Count IV of Emerald's counterclaim for cancellation and rescission of the April 1, 1993 Fee Agreement between Emerald and HLRD.

10. With respect to Emerald's counterclaim for indemnification and/or contribution (Count I), judgment is entered in accordance with the Order filed by this Court on March 26, 1997 (Docket Entry #222). Accordingly, defendant Emerald's counterclaim for indemnification and/or contribution and its Motion for Contribution and Indemnification Under Both Federal and State Law are *moot* to the extent they seek contribution and indemnification under federal law, and denied without prejudice to re-urging to the extent Emerald seeks contribution and indemnification under state law.

Rule 54(b) Determination

This Judgment is entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, as the Court finds there is no just reason for delay in respect to the entry of this Judgment.

IT IS SO ORDERED this 14 day of April, 1997.

s/ MICHAEL BURRAGE

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LERA THOMAS,

Plaintiff,

vs.

TULSA JOB CORPS,

Defendant.

Case No. 97-CV-~~136~~-H 186

ORDER GRANTING DISMISSAL OF MANAGEMENT & TRAINING CORPORATION

NOW on this 11TH day of April, 1997, comes on for consideration the above styled matter and the Court, being fully advised in all premises, finds that good cause has been shown to dismiss Management & Training Corporation from this action, as requested in the joint stipulation of Plaintiff and Management & Training Corporation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Management & Training Corporation should be and is hereby dismissed from this action.

JUDGE SVEN ERIK HOLMES
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 30 OF WASHINGTON COUNTY, OKLAHOMA, RICHARD THOMPSON, THOMAS PROCTOR, ROBERT BONNER, EMORY PITZER, SIGRID WILLIAMS, CONNIE ELLIS, MARTA MANNING, MARK MILLER, DENNIS PANNELL, MARY PONDER, JOHN SCROGGINS, and JOANNE WARD,

Defendants.

Case No. 95-C-1003-BU

JUDGMENT

This action came before the Court upon Plaintiff, St. Paul Fire and Marine Insurance's Motion for Summary Judgment, Defendant, Independent School District No. 30 of Washington County, Oklahoma's Counter-Motion for Summary Judgment, Defendants, Richard Thompson, Thomas Proctor, Robert Bonner, Emory Pitzer, Sigrid Williams, Connie Ellis, Marta Manning, and Mark Miller's Counter-Motion for Partial Summary Judgment, Defendant, Joanne Ward's Counter-Motion for Partial Summary Judgment and Defendant, Dennis Pannell's Counter-Motion for Partial Summary Judgment, and the issues having been duly considered and a decision having been duly rendered and the Court, having expressly determined pursuant to Rule 54(b), Fed. R.Civ.P., that there is no just reason for delay and has expressly directed the entry of judgment as to the claims of Plaintiff, St. Paul Fire and Marine Insurance Company, against Defendants, Independent School District No. 30 of Washington County, Oklahoma,

77

Richard Thompson, Thomas Proctor, Robert Bonner, Emory Pitzer, Sigrid Williams, Connie Ellis, Marta Manning, Mark Miller, Joanne Ward and Dennis Pannell and as to the counterclaims of these same Defendants against Plaintiff,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Plaintiff, St. Paul Fire and Marine Insurance Company, on its claims against Defendants, Independent School District No. 30 of Washington County, Oklahoma, Richard Thompson, Thomas Proctor, Robert Bonner, Emory Pitzer, Sigrid Williams, Connie Ellis, Marta Manning, Mark Miller, Joanne Ward and Dennis Pannell.

IT IS ALSO ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Plaintiff, St. Paul Fire and Marine Insurance Company, on the counterclaims asserted against Plaintiff by Defendants, Independent School District No. 30 of Washington County, Oklahoma, Richard Thompson, Thomas Proctor, Robert Bonner, Emory Pitzer, Sigrid Williams, Connie Ellis, Marta Manning, Mark Miller, Joanne Ward and Dennis Pannell.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff, St. Paul Fire and Marine Insurance Company, is entitled to its costs of action against Defendants Independent School District No. 30 of Washington County, Oklahoma, Richard Thompson, Thomas Proctor, Robert Bonner, Emory Pitzer, Sigrid Williams, Connie Ellis, Marta Manning, Mark Miller, Joanne Ward and Dennis Pannell.

Dated at Tulsa, Oklahoma, this 14th day of April, 1997.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDY D. GRIFFIN,

Plaintiff,

vs.

LLOYD RICHARDS TEMPORARIES, INC.,

Defendant.

No. 96-C-463-K

ORDER

The Court, having been advised that the parties to this action have agreed to a settlement and dismissal with prejudice of all claims, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an admistrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 10 day of April, 1997.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

24

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEITH M. JEHLE,

Petitioner,

vs.

No.97-CV-328-B

OSAGE COUNTY SHERIFF'S DEPARTMENT, sued as Osage Co/ S Okla,

Respondent.

ORDER

Petitioner, a prisoner in state custody appearing pro se, has filed a "motion" requesting that this Court "dissmiss [sic] the jurys [sic] verdict on grounds of missleading [sic] jury at time of trial, on the date March 14th 1997." The Court liberally construes Petitioner's pleading as a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 as he appears to be attacking the validity of his conviction in Osage County District Court, Case No. CF-96-110. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally).

Pursuant to 28 U.S.C. § 2254(b)(1)(A), an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. In this case, it is apparent from the face of the "motion" submitted to this Court that Petitioner has failed to exhaust the remedies available in the courts of the State of Oklahoma. Therefore, the Petition for a Writ of Habeas Corpus is **dismissed without prejudice** for failure to exhaust state remedies.

(2)

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's "motion," liberally construed to be a Petition for a Writ of Habeas Corpus, is **dismissed without prejudice** for failure to exhaust state remedies. The Clerk is directed to mail a copy of Petitioner's pleading and this Order to Petitioner.

SO ORDERED THIS 11th day of April, 1997.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOM LESTER PUGH,

Petitioner,

vs.

RON WARD, Warden, Oklahoma State Penitentiary, DREW EDMONDSON, Attorney General of the State of Oklahoma,

Respondents.

Case No. 96-CV-976-B

ORDER

At issue before the Court is Respondent's Motion to Dismiss for failure to exhaust state remedies (Docket # 8). After careful review of the record and applicable legal authorities, the Court hereby GRANTS Respondent's Motion to Dismiss.

The pivotal issue raised by Respondent's Motion is whether Petitioner should be required to fairly present to the highest court of the State his claim that Oklahoma waived its jurisdiction to imprison him on this life sentence once Petitioner was transported to Arizona to serve several prison terms in 1973. Despite Petitioner's arguments there is an absence of corrective process and any appeal would be futile, the Court believes the State's highest court should be given the opportunity to first resolve the issue. See 28 U.S.C. § 2254(b)(1).

Therefore, Respondent's Motion to Dismiss for failure to exhaust state remedies is GRANTED. The Petition for a Writ of Habeas Corpus is DISMISSED WITHOUT

(10)

PREJUDICE pending exhaustion of state remedies.

Counsel for Petitioner is hereby directed to retrieve the original state court records previously submitted to the Court on or before April 22, 1997.

IT IS SO ORDERED this 11th day of April, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES L. GADDY, Plaintiff,	)	
v.	)	No. 96-C-434-K
ONEOK, INC., a Delaware corporation, d/b/a OKLAHOMA NATURAL GAS COMPANY, Defendant.	)	

ORDER OF DISMISSAL WITHOUT PREJUDICE

Upon stipulation of the parties and pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the above-styled matter is hereby dismissed without prejudice to refiling.

TERRY C. KERN, Chief United States District Judge

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35

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUISE M. BAUER and LLOYD E. BAUER,

Plaintiffs,

vs.

No. 96-C-537-B

GENERAL MOTORS CORPORATION, a Delaware corporation,

Defendant.

ORDER

Before the Court is the Motion for Summary Judgment filed by defendant General Motors Corporation ("GM"). (Docket No. 13). In this action, plaintiffs Louise M. Bauer ("Bauer") and her husband, Lloyd E. Bauer, bring claims of negligence and manufacturers' product liability against GM. Bauer alleges that she was injured due to manufacturing/design defect(s) in the 1994 Pontiac Grand Prix ("Grand Prix") she was driving when the vehicle accelerated out of control and crashed into an embankment. GM seeks summary judgment based on Bauer's failure to establish genuine issues of material fact regarding the presence of any defect in the Grand Prix at the time it left GM's control and that the defect caused her injuries.

A. Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In

(18)

Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

B. Analysis

To state a claim of manufacturers' product liability Bauer must prove (1) that the Grand Prix was the cause of her injuries, (2) that the **defect existed in the Grand Prix (since the action is against the manufacturer) at the time the Grand Prix left GM's possession and**

control, and (3) that the defect made the Grand Prix unreasonably dangerous. *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1363 (Okla. 1974). Bauer alleges she was driving the Grand Prix on October 3, 1995 on a public road in Delaware County in a reasonable and proper manner when the vehicle accelerated uncontrollably through an intersection and crashed into an embankment. She also alleges that the driver's side air bag did not fully inflate. Bauer contends that the injuries she sustained resulted from manufacturing/design defects in the throttle and braking mechanisms and the air bag system of the Grand Prix. In addition to her manufacturers' products liability claim, Bauer claims that GM was negligent (1) in designing, manufacturing, and selling the Grand Prix in a defective and dangerous condition; (2) by failing to warn her and other users of the inherent danger and defective condition of the Grand Prix; and (3) by failing to adequately inspect, research, and test the vehicle for defects in the design and manufacture. *Amended Complaint, Docket No. 2.* A common element of both claims is the existence of a manufacturing or design defect in the Grand Prix. Thus, to succeed in establishing her negligence and manufacturers' products liability claims against GM, Bauer must prove the existence of an alleged defect(s) in the Grand Prix **at the time it left GM's control**.[1]

In support of its motion for summary judgment, GM presents the affidavit and deposition of Dave Buist ("Buist") and the affidavit of Keith S. Schultz ("Schultz"), expert witnesses for GM, who testify that there was no manufacturing/design defect in the subject vehicle, *i.e.*, in the throttle mechanism, the braking mechanism or the air bag system, at the time of the accident or

[1]Although Bauer alleges a failure to warn as one of the bases of her negligence and products liability claims, there is no evidence in the record of a "known potential risk" in the Grand Prix which would render it dangerous and give rise to a duty to warn on the part of GM. *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1332 (10th Cir. 1996)(applying Oklahoma law).

when it left GM's control. Both experts are mechanical engineers and GM employees: Schultz is a Staff Analysis Engineer who has been employed by GM for twelve years; and Buist is a Staff Project Engineer who has been employed by GM for 33 years.

Schultz investigated the allegation of improper deployment of the driver's side air bag. After reviewing "information retrieved from the sensing diagnostic module ("SDM") of the subject vehicle, the accident report filed by the investigating officer, the medical records pertaining to Plaintiff Louise M. Bauer, and photographs of the subject vehicle," Schultz concluded the following:

> Based upon my experience and training, it is my opinion that the evidence in this case demonstrates that the SIR [supplemental inflatable restraint, *i.e.*, air bag, system] was functioning properly at the time of the accident. It is my further opinion that the air bag was not defective in any respect. Furthermore, it is my opinion that the injuries, if any, sustained by Ms. Bauer, would have been more severe had the SIR not deployed . . .

Affidavit of Keith S. Schultz ¶10, Ex.A to Defendant's Motion for Summary Judgment and Brief in Support Thereof [hereinafter, "GM's Summary Judgment Motion"]. Bauer offers no evidence in her response to dispute Schultz's expert opinion;[2] thus, there is no fact question concerning the existence of a defect in the air bag system.

Buist investigated Bauer's allegations of manufacturing/design defects in the throttle and braking mechanisms of the Grand Prix. On February 5, 1997, Buist inspected the Grand Prix at the Bauers' residence where it had been parked since shortly after the accident. *Deposition of Dave Buist, pp.83-84, 103, Ex. C to Defendant's Reply.* In addition to his physical inspection of

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[2]In its reply, GM also attaches the deposition testimony of Tony Barrett ("Barrett"), the wrecker driver who towed the Grand Prix from the accident scene. Barrett testifies that the air bags were deployed in the vehicle when he picked up the Grand Prix. *Deposition of Tony Barrett, p. 35, Ex. B. to Plaintiffs' Response.*

the vehicle, he reviewed the vehicle's diagnostic trouble codes, the accident report, the vehicle's warranty repair records, the Grand Prix owner's and service manuals, interrogatories and the depositions of the Bauers and Tony Barrett ("Barrett"). *Deposition of Dave Buist, pp. 132-134, Ex. C to Defendant's Reply.* Based on the above and his experience and training, Buist concluded the following:

> it is my opinion that the evidence in this case demonstrates that the throttle and cruise control systems and braking systems were functioning properly at the time of the accident. It is my further opinion that the throttle and cruise control systems and the brake systems were not defective in any respect.

Affidavit of Dave Buist ¶8, Ex.B to GM's's Summary Judgment Motion.

Bauer argues that Buist's testimony does not "rise to the level of a conclusive determination . . . to justify the entry of summary judgment" because (1) Buist did not inspect the car until over one year after the date of the accident and the inspection was limited; (2) Buist never before investigated a claim of unintended acceleration; and (3) Buist "did not check to see if any other claims of unanticipated acceleration have ever been made against General Motors for comparison to the instant case."[3] *Plaintiff's Response, p. 6.* These criticisms, however, go to the weight of Buist's expert opinion and not to the existence (or, in this case, the nonexistence) of a factual dispute. *Thrasher v. B&B Chemical Co., Inc.*, 2 F.3d 995, 998 (10th Cir. 1993).

GM has established that Buist is qualified to give an expert opinion on the question of manufacturing/design defect in the Grand Prix. Buist is a mechanical engineer with 33 years of experience in the automobile industry. Buist physically inspected and photographed the Grand

[3]Certainly, it is in plaintiff's interest to discover the existence of other unintended acceleration complaints against GM. However such discovery is routinely effected through the efforts of the plaintiff, *e.g.* through interrogatories and requests for production of documents. Defendant's expert is not required to investigate the existence of other unintended acceleration complaints as one of the bases for his opinion in this case.

Prix, including the throttle plate and cables, the cruise control module and cables, the accelerator cable, the brake assembly system (including the caliper bolts, knuckles, torques head bolts), the second gear start switch and air inlet hoses. *Deposition of Dave Buist, pp. 63-100, Ex. C to Defendant's Reply.* Buist checked the brakes to determine if the linkage were sufficient to operate the brake pads and measured the distance between the brake and accelerator pedals. *Deposition of Dave Buist, p.116, Ex. C to Defendant's Reply.* Buist also reviewed the diagnostic trouble codes from the Grand Prix's computer. *Deposition of Dave Buist, pp. 101-111, Ex. C to Defendant's Reply.* Although this inspection occurred over a year after the accident, the record reflects that the Grand Prix had not been driven since the accident and had remained in the control of the Bauers since Barrett towed the car to their residence. *Deposition of Dave Buist, p. 103, Ex. C to Defendant's Reply; Deposition of Louise M. Bauer, p. 116, Ex.A. to Plaintiff's Response; Deposition of Tony Barrett, p. 47, Ex.B. to Plaintiff's Response.* Based on the above, Buist's expert opinion meets GM's burden of production on summary judgment to negate Bauer's allegation of manufacturing/design defects in the Grand Prix.

In response to GM's evidence of no manufacturing/design defect, Bauer provides her deposition testimony that the Grand Prix accelerated uncontrollably and that she was unable to slow or stop the vehicle even when she reached down and "jiggled" the accelerator with her hand while both feet were on the brakes. *Deposition of Louise M. Bauer, p. 77-82, Ex.A. to Plaintiff's Response.* Bauer also attaches excerpts from the deposition of Barrett, the wrecker driver who towed the Grand Prix to his shop after the accident, to Ernie Miller Pontiac in Tulsa, Oklahoma, and back to the Bauers' residence.

Barrett testifies that two days after the accident he inspected the vehicle, started it a

"dozen times" and each time the throttle was "wide open." . *Deposition of Tony Barrett, pp. 36-41, Ex.B. to Plaintiff's Response.* Barrett also testifies that he "reached in and pushed the -- pushed the brake down, and it felt -- it didn't feel good. I mean, they didn't go plumb to the floor or nothing, but they felt real awkward." *Deposition of Tony Barrett, p. 37, Ex.B. to Plaintiff's Response.* Although Barrett concludes "there was a problem there somewhere," he states that

> we didn't work on it or nothing like that. I just, when I found [the throttle wide open], I just left it alone. We didn't hook anything up to it or nothing like that as far as bothering it. . . . Cause there was no sense in, you know, messing with it anymore. I didn't want to disturb anything -- After that, I didn't want to disturb anything what was -- you know, where a dealership -- 'cause she had talked about taking it to a dealership then.

Deposition of Tony Barrett, p. 37, 39-40, Ex.B. to Plaintiff's Response. Barrett then testifies that he towed the Grand Prix to Ernie Miller Pontiac:

> Well, I just took it in up there, and there was -- I don't know, there's four or five like service writers there at Ernie Miller, and I pulled into the door with it, I had it on the truck, and I asked them where they wanted it. And he asked me if it would drive, and I said don't even start it, and think about it, because you'll go plumb through the back of the building with it because it's stuck at wide open throttle.
>
> And I don't know, I wished I had gotten the guy's name, but there was a man and a woman that's service writers there that come over there. And while it was on the truck in park, because I had it lifted it up from the front, it's front-wheel drive, I reached in and started the car and it was wide open throttle, and I shut it back off. And he said that thing is running wide open, isn't it. And I said it's -- I said, yeah, you know, I said you probably need to get me to set it down wherever and, you know, -- wherever you-all need it, and you need to push it in or however you want to get it in, but I wouldn't start it and try to drive it in.
>
> . . . .
>
> At a later date, and I don't even know when it was, [Ms. Bauer] called me, and I went back to Ernie Miller's and picked it up and delivered it back to [the Bauers'] residence.

Deposition of Tony Barrett, pp. 46-47, Ex.B. to Plaintiff's Response.

This deposition testimony does not meet Bauer's burden of showing specific facts sufficient to raise a "genuine issue of material fact" as to the existence of a manufacturing/design

defect.[4] *Anderson*, 477 U.S. at 247-48. Bauer correctly cites *Kirkland* for the proposition that a manufacturers' product liability case can be made by circumstantial evidence:

> The practicing lawyer identified with the Plaintiff will seldom be able to produce actual or absolute proof of the defect so necessary in manufacturers' product liability since this information in the final analysis is usually within the peculiar possession of the Defendant. Carefully prepared interrogatories or depositions may be helpful to a Plaintiff, but more than likely Plaintiff may be forced to rely on circumstances and Proper inferences drawn therefrom in making his proof. We note that in some accidents the surrounding circumstances and human experience should make Plaintiff's burden less arduous; he may be able to sustain his burden, but more than likely if the Defendant is a manufacturer or assembler of some highly complex product such as an automobile, human experience will play little or no part in reducing his burden, and he will be relying upon the inference drawn from circumstantial evidence.

Kirkland, 521 P.2d at 1363-64. And this is the type of case *Kirkland* acknowledges as particularly suitable for an "inference drawn from circumstantial evidence." However, *Kirkland* also recognizes that

> we do not infer that the injury is of itself proof of the defect, or that proof of injury shifts a burden to the Defendant. In Lyons v. Valley View Hospital, Okl., 341 P.2d 261 (1959), we said:
> "Cases are legion in which we have held that the mere happening of an accident raises no presumption of negligence on the part of the defendant."
> Nor does it raise any presumption of defectiveness in the article involved in an accident.

Kirkland, 521 P.2d at 1363. As there is no presumption of defectiveness, the circumstantial evidence must be sufficient to justify an inference of a "reasonable probability" as distinguished from the "mere possibility" that a manufacturing/design defect exists. *See Sadler v. T.J. Hughes Lumber Co.*, 537 P.2d 454, 457 (Okla. App. 1975)(on causation); *Orth v. Emerson Electric*

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[4]Because the Court finds no genuine issue of material fact as to the existence of a manufacturing/design defect in the Grand Prix, the Court need not reach whether there is a fact question concerning causation.

Co., White-Rodgers Div., 980 F.2d 632, 636 (10th Cir. 1992).[5]

The above deposition testimony of Bauer and Barrett is the only evidence offered by Bauer to defeat summary judgment. There is no expert testimony [6] tying the "wide open throttle" and "awkward" brakes observed by Barrett, or the unintended acceleration and brake failure observed by Bauer, to a manufacturing/design defect or defects in the Grand Prix existing at the time the vehicle left the possession and control of GM two years earlier.[7] Barrett in fact testifies that he deliberately did not investigate the cause of the "wide open throttle" or "awkward" brakes because the mechanics at Ernie Miller Pontiac were going to look at the car. *Deposition of Tony Barrett, p. 39-40, Ex.B. to Plaintiff's Response.* Notably, there is no testimony or service report by the mechanics at Ernie Miller Pontiac identifying any manufacturing/design defect in the Grand Prix. There is also no evidence of other similar incidences of unintended accelerations and/or brake failures of 1994 Pontiac Grand Prix or similar model automobiles. In short, there is no

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[5]Whether the question is one of causation or defect in a products liability case, "circumstantial evidence is sufficient if it 'tend[s] to negate other reasonable causes, or there [is] an expert opinion that the product was defective.' Such evidence 'must justify an inference of probability as distinguished from mere possibility.' It may be based on an expert's learned analysis and assumptions derived from his experience, study and knowledge." *Orth v. Emerson Electric Co., White-Rodgers Div.*, 980 F.2d 632, 636 (10th Cir. 1992)(quoting *Mays v. Ciba-Geigy Corp.*, 233 Kan.38, 661 P.2d 348, 360 (1983).

[6] At the pretrial conference on March 21, 1997, one month before the trial date of April 21, 1997, plaintiffs sought a late hour designation of an expert witness, which GM opposed. The Court denied plaintiffs' request as untimely and prejudicial to GM given that plaintiffs' deadline for designating expert witnesses was January 10, 1997, discovery cut-off was February 14, 1997, and GM prepared for trial and presented their experts for deposition based on plaintiffs' Expert Witness Disclosure advising GM "that Plaintiffs have not retained any person who is anticipated to testify at the time of trial to present evidence under Rules 702, 703 or 705 of the Federal Rules of Evidence." *Docket No. 12.* At the pretrial conference, plaintiffs' counsel explained that he had earlier advised his clients that they needed "some type of expert testimony," but because of the cost, plaintiffs had been unwilling to retain an expert until they were persuaded of the need for such at the settlement conference held on March 19, 1997. Plaintiffs' counsel also informed the Court that although he had contacted an expert to respond to the summary judgment motion (which was due that day), he did not know if the expert would ultimately support plaintiffs' claim of manufacturing/design defect because the expert had yet to conduct an investigation.

[7]The only evidence in the record regarding GM's possession and control of the Grand Prix is that the vehicle was manufactured in October 1993. *Deposition of Dave Buist, p. 49, Ex. C. to Defendant's Reply.*

evidence, direct or circumstantial, of a manufacturing/design defect in the Grand Prix from which the jury could reasonably find for the plaintiff.[8] *See Brown v. Ford Motor Co.*, 494 F.2d 418 (10th Cir. 1974).

Accordingly, the Court grants GM's Motion for Summary Judgment (Docket No. 13).

ORDERED this 10th day of April, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

[8] *Cf. Thrasher v. B&B Chemical Co., Inc.*, 2 F.3d 995, 997-998 (10th Cir. 1993) (reversed and remanded trial court's grant of summary judgment to defendant, finding that an expert engineer's affidavit wherein he identified "a design or manufacturing defect [in a barrel similar to the one which erupted and injured plaintiff worker] whereby the plastic liner and drum end cap misalign, creating a small opening through which chemicals could spray a significant distance if released under pressure," though "slim" evidence, was sufficient to raise a fact question as to the existence of a manufacturing/design defect in the subject barrel).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUISE M. BAUER and
LLOYD E. BAUER,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
a Delaware corporation,

Defendant.

No. 96-C-537-B

JUDGMENT

In accord with the Order filed this date sustaining Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of Defendant General Motors Corporation and against Plaintiffs Louise M. Bauer and Lloyd E. Bauer. Costs may be awarded upon proper application.

Dated, this 10th day of April, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

19

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHY M. LONG,

Plaintiff,

v.

JOHN J. CALLAHAN,
Commissioner of Social Security,[1]

Defendant.

Case No: 95-C-835-W

ENTERED ON DOCKET

DATE 4/11/97

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed April 10, 1997.

Dated this 10th day of April, 1997.

JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

[1]Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan, is substituted for Shirley S. Chater, Commissioner of Social Security, as defendant in this action.

28

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHY M. LONG,

Plaintiff,

v.

JOHN J. CALLAHAN, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 95-C-835-W

ENTERED ON DOCKET

DATE 4/11/97

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Commissioner of Social Security ("Commissioner") denying plaintiff's application for disability insurance benefits under § 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Leslie S. Hauger, Jr. (the "ALJ"), which summaries are incorporated herein by reference. The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[2]

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[1] Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

[2] Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Commissioner's decisions. The

27

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that claimant had the residual functional capacity to perform a full range of light work of an unskilled nature, subject to no lifting or carrying of over 25 pounds, but with the ability to frequently lift and occasionally carry 20 pounds, continuously lift and frequently carry up to 10 pounds, sit for 4 hours at a time up to 8 hours per day, stand for an hour at a time up to 4 hours per day, walk up to 30 minutes at a time for no more than 2 hours per day, and only occasionally squat, crawl or climb. He concluded that claimant's impairments and residual functional capacity precluded her from performing her past relevant work, but considering her impairments, residual functional capacity, age, education, and work

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Commissioner's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Commissioner's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3]The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

experience, there existed occupations in the national economy in significant numbers that she could perform. Having determined that there were occupations in the national economy that claimant could perform, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ erred in applying an incorrect legal standard to evaluate the limiting effects of claimant's pain and therefore substantial evidence does not support his assessment of her residual functional capacity.

(2) The ALJ failed to show that claimant could perform a significant number of jobs, because the hypothetical question he presented to the vocational expert did not accurately reflect her impairments and cross-examination of the expert resulted in the expert finding her unable to work.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that she has been unable to work since February 2, 1992, because of her inability to go up and down stairs and do any lifting, rapid heart beat, leg swelling, back pain, and fatigue (TR 65). She was hospitalized on September 22, 1991 for a nontransmural anterior wall myocardial infarction (TR 106-126). When she was released, she was doing well and had had no symptoms or chest discomfort for 48 hours (TR 106). The doctor noted that she smoked 1-1½ packs of cigarettes a day (TR 108). On September 23, 1991, an echogram showed a normal sinus rhythm and mild left ventricular impairment (TR 126). On September 26, 1991, the

doctor reported that her heart had "[r]egular rate and rhythm. No clicks, rubs or murmurs noted." (TR 109). His final diagnosis was "unstable angina" and "chronic tobacco abuse." (TR 109). She was told to stop smoking (TR 107). A stress test on October 31, 1991 "evoked no chest pain." (TR 127).

On June 2, 1992, Dr. Frederic H. Ferguson, claimant's treating doctor, examined her (TR 142-144) and diagnosed unstable angina, a past myocardial infarction, and chronic lumbar spine dysfunction with associated myocitis and spasm (TR 144). The doctor concluded that the prognosis for both problems was poor (TR 144). He found that "[s]itting, standing, moving about, lifting, carrying, handling objects, are all impaired significantly due to quick onset of fatigue and low back pain due to the cardiac and lumbar spine problems respectively." (TR 144).

On March 27, 1993, claimant was treated for a fracture and dislocation of the left ankle and given an open reduction with internal fixation (TR 154-156). The doctor found that her heart tones were normal, a chest x-ray and EKG were normal, and she had had no recent history of heart pain (TR 154). By April 23, 1993, she was in a nonweight bearing short leg cast and the fracture was well aligned (TR 155). The claimant went to full weight bearing on May 14, 1993 (TR 182). The fracture was healed clinically and radiographically on June 4, 1993 and she was fitted with a stromgren ankle support and encouraged to strengthen and improve her range of motion (TR 181).

On March 25, 1994, Dr. E. Joseph Sutton did a consultative exam of claimant (TR 183-186). The doctor noted that she was still smoking (TR 184). Her heart

rhythm was regular, without murmurs or gallops (TR 184). The doctor found that she had a significant decrease in range of motion of her left ankle and no edema (TR 184). He stated that she "was on and off the examination table, in and out of a chair, etc., without any difficulty." (TR 184). The doctor reported that she had no back tenderness or muscle spasm (TR 185). He said that she "seemed to be unable to do the shoulder range of motion studies and said that she could not move her arms through the normal range of motion, however, when she was distracted she could do this easily and I could passively move her shoulders through a normal range of motion without any pain or restrictions." (TR 184).

Dr. Sutton concluded that claimant should be able to sit a total of 4 hours at one time, stand 1 hour at one time, and walk 30 minutes at one time (TR 185). During an entire 8 hour day, he stated that she should be able to sit for 8 hours, stand for 2 to 3 hours, and walk for 1 to 2 hours (TR 185). He concluded that she probably had significant degenerative disease of the left ankle, secondary to her fracture, but was fairly functional in her home setting (TR 185). He stated:

> While I do not believe she would be able to do occupational activity where she was on her feet all day, I do not see why she would not be able to do clerical type activities where she sat most of the day and would only occasionally have to walk around an office and in and out of a parking lot getting to work. She has done this type of work in the past. The patient probably can never lift 51 to 100 pounds, infrequently lift 26 to 50 pounds, occasionally 21 to 25 pounds, frequently 11 to 20 pounds and anything less than this continuously. Most of this was based on the fact that the patient has complaints of back pain, although these seemed very subjective to me and the patient really did not seem to have much discomfort with any of her range of motion activities involving her back. She did, however, seem to have some restriction with the range of motion in her low back. She would not have any

> restrictions lifting if it was only limited to her upper extremities as she has no symptoms attributable to this anatomic area and seems to be completely normal. The patient would have some difficulty carrying weights however. She probably could never carry anything more than 26 pounds, infrequently carry 21 to 25 pounds, occasionally 11 to 20 pounds and anything less than that frequently although would not be able to carry it very far. By far, this patient's biggest restriction is her ankle and I do not believe that she would fair well if she was required to carry or walk very far or to be required to carry very much weight for a long distance. There does not seem to be any restriction of the patient's feet for repetitive movements as in pushing and pulling leg controls. She is able to drive without any difficulty.

(TR 185) (emphasis added).

At a hearing on April 19, 1993, claimant admitted that she had learned to live with a certain amount of pain (TR 215). She testified that she cared for her children, and grandchild, cooked, cleaned, and crocheted (TR 210). She said that she could lift her eighteen-pound granddaughter (TR 241). She wrote that she did crafts, went camping, visited friends, and walked about a fourth mile a day (TR 68, 73).

There is no merit to claimant's contention that the ALJ failed to properly consider claimant's pain. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987).

The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed the factors in addition to medical test results that agency decision makers should consider when judging the credibility of subjective claims of pain greater than that usually associated with a particular impairment.

> [W]e have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems . . . [and] the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive.

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "`[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.'" Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a back problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's

subjective allegations of pain." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

The ALJ considered claimant's allegations of pain, and other limitations under the criteria set forth in Luna and 20 C.F.R. 404.1529 and 20 C.F.R. 416.929 (TR 28). He considered the entire record, including her testimony, subjective complaints, prior work record, and observations of treating and examining physicians (TR 28). After these considerations, the primary reasons he found claimant's allegations to not be fully credible were the lack of objective findings by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians, and the lack of discomfort shown by claimant at the hearing (TR 28). He noted that the objective medical evidence demonstrated that claimant had had a heart attack, but had remained asymptomatic with respect to chest pain (TR 29). Her back had never been examined by any means other than physical examination, and examination had shown minimal pain related to her back and no spasms which would be indicative of pain (TR 29). Straight-leg-raising tests were negative and did not produce pain (TR 29).

The ALJ noted that Dr. Ferguson's physical examination of the claimant was less favorable to allegations of pain and limitation than was the physical examination of Dr. Sutton (TR 95). Dr. Sutton's assessed limitations were more restrictive than the limitations of Dr. Ferguson, and physical findings of Dr. Sutton included limitations because of the ankle injury (TR 29). The ALJ also pointed out that Dr. Sutton wrote that claimant would not go as far as possible in range of motion testing, so he

distracted her and continued the range of motion testing, which did not cause pain for her (TR 29).

The ALJ concluded that claimant's allegations of pain were not credible because even her treating physician did not find significant pain in her lumbar spine (TR 29). He also noted that claimant did not currently see a physician for her back complaints (TR 29). The ALJ gave specific legitimate reasons which were supported by objective evidence to give Dr. Sutton's opinion more weight than Dr. Ferguson.

There is substantial evidence to support the ALJ's conclusion that claimant has a residual functional capacity to perform a full range of light work, subject to certain limitations. There was no objective evidence to support her self-serving testimony that pain prevents her from working. It has been recognized that "some claimant's exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey, 816 F.2d at 517.

There is also no merit to claimant's contention that the ALJ failed to show that claimant could do a significant number of jobs, because the hypothetical question he presented to the vocational expert did not accurately reflect her impairments. It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Commissioner's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include

impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially the ALJ established that the vocational expert was familiar with the regulations pertaining to disability (TR 242). The ALJ's hypothetical question assumed that claimant could work, subject to certain limitations (TR 243).[4] The vocational expert concluded that there were "a number of sedentary jobs that would fit that hypothetical."[5] (TR 243). Claimant's representative at the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to assume impairments that the ALJ properly deemed unsubstantiated based on objective evidence in the record. (TR 245-250). These opinions, based on

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[4] The ALJ's hypothetical question was as follows:

> Assuming a woman is age 49, has a high school education and the same past relevant work as the claimant in this case. That I find that such a person can perform work, which is subject to the following limitations. No lifting or carrying over 25 pounds, but with the ability to frequently lift and occasionally carry 20 pounds and continuously lift and frequently carry up to ten pounds. She's limited to -- well, she can sit for four hours at a time, up to eight hours a day, can stand for an hour at a time, up to four hours a day. And can walk for 30 minutes at a time, for no more than two hours a day and who can only ocasionally squat, crawl or climb. Would such a person be able to do any substantial gainful activity in the economy, in your opinion? (TR 243).

[5] The vocational expert testified that the hypothetical person could perform light sewing machine operator work and there were 1746 such jobs in the state, sedentary teachers aide work and there were 885 such jobs in the state, sedentary cashier work and there were 10,000 such jobs statewide, sedentary-bookkeeper work and there were approximately 1,000 such jobs statewide, and sedentary telephone solicitor work and there were approximately 740 such jobs statewide. (TR 243-244).

unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 9th day of April, 1997.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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